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No.

IN THE
Supreme Court of the United States
October Term, 1988

DEBORAH HANSON FULLER, Individually and as Provisional Tutrix of the Minor, Jay Brian Fuller,
Petitioner,

v.

UNITED STATES AIRCRAFT INSURANCE GROUP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether, having been admitted to the Union pursuant to treaty and organic act requirements that its constitution be consistent with the United States Constitution (including the Seventh Amendment), the State of Louisiana may subsequently amend the state constitution to provide for *de novo* appellate review of facts found by a jury in a civil case, contrary to the provisions of the Seventh Amendment.

2. Whether, in civil cases where the State of Louisiana has chosen to grant its citizens a trial by jury in accordance with the Seventh Amendment, a state appellate court may on appeal reverse the facts found by the jury and render a new judgment in accordance with its own findings based upon a *de novo* review of the record, instead of remanding the case for a new jury trial as required by the rules of common law.

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UNITED STATES AIRCRAFT INSURANCE GROUP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, SECOND CIRCUIT

The petitioner, Deborah Hanson Fuller, individually and as provisional tutrix of the minor, Jay Brian Fuller, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal, Second Circuit, State of Louisiana, entered in this proceeding on August 17, 1988.

OPINIONS BELOW

The opinion of the Court of Appeal, Second Circuit, State of Louisiana, is reported at 530 So.2d 1282, and is reprinted in the Appendix hereto, App. 3a, *infra*.

Denial of the Petition for Rehearing is unreported, but is reprinted in the Appendix hereto, App. 2a, *infra*.

Denial of the Petition for a Writ of Certiorari by the Louisiana Supreme Court has not yet been reported, but is reprinted in the Appendix hereto, App. 1a, *infra*.

JURISDICTION

The judgment and opinion of the Louisiana Court of Appeal, Second Circuit, were entered on August 17, 1988. (App. 3a, *infra)* A rehearing petition was denied on September 15, 1988. (App. 2a, *infra*.) On December 9, 1988, the Louisiana Supreme Court denied petitioner's timely Petition for a Writ of Certiorari. (App. 1a, *infra*) This Petition for Certiorari was filed within ninety (90) days of the latter date.

This Court's jurisdiction is invoked under 28 U.S.C. 1257(a).

STATUTES INVOLVED

The following provisions from the treaties, organic acts, constitutions and statutes of the United States and the State of Louisiana have been printed in the Appendix:

Treaties with French Republic (App. 27a, *infra*):

Cession of Louisiana — Treaty of 1803; Article III

Organic Acts of Congress Respecting Admission of State of Louisiana (App. 28a, *infra*):

Act of Congress, March 26, 1804, c. 38, 2 U.S. Stat. 283, An Act erecting Louisiana into two territories, and providing for the temporary government thereof, Sec. 4 and Sec. 5 in pertinent part.

Act of Congress, March 3, 1805, c. 23, 2 U.S. Stat. 322, An Act further providing for the government of the territory of Orleans, Sec. 1 and Sec. 7 in pertinent part.

Act of Congress, February 20, 1811, c. 21, 2 U.S. Stat. 641, An Act to enable the people of the Territory of Orleans to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the other states, and for other purposes, Sec. 1 and Sec. 3 and Sec. 4 in pertinent part.

Act of Congress, April 8, 1812, c. 50, 2 U.S. Stat. 701, An Act for the admission of the state of Louisiana into the Union and to extend the laws of the United States to the said state, Sec. 1 and Sec. 3.

Constitutions of the State of Louisiana (App. 31a, *infra*):

Constitution of 1812, Article IV, Sec. 2.

Constitution of 1898, as amended by Acts 1906, No. 137, adopted November 6, 1906, Article 98.

Constitution of 1974, Article 5, Section 10 (B).

Constitution of the United States (App. 32a, *infra*):

Bill of Rights, Amendment VII.

Louisiana Code of Civil Procedure (App. 33a, *infra*):

Article 1731(A)

Article 1732

Article 1733 (A)

STATEMENT OF THE CASE

Deborah Hanson Fuller, the petitioner herein, brought this suit in the First Judicial District Court for the Parish of Caddo, State of Louisiana, individually and on behalf of her minor son, Jay Brian Fuller. The wrongful death action arises from

the May 28, 1981, crash of a 1980 Beech Bonanza A36TC aircraft owned by Blanco Oil Company. The crash resulted in the deaths of Douglas Gordon Fuller and the other three occupants of the airplane. Doug Fuller was survived by his three-month-old son, Jay Brian Fuller, and his wife, the petitioner, Deborah Hanson Fuller. Although suit was filed against numerous defendants, petitioner has disposed of her claims against all parties except respondent, United States Aircraft Insurance Group, who was the insurer both of the pilot of the airplane, Joe Bob White, and the oil company of which he was the president and owner, Blanco Oil Company.

The primary issue at trial and on appeal has been the independent contractor status of Doug Fuller. District Judge Stewart of the First Judicial District Court, Parish of Caddo, presided over the jury trial in this matter from April 6, 1987, through April 21, 1987. On the evening of April 21, 1987, the jury returned its verdict in the form of special interrogatories. After listening to two weeks of testimony, the jury unanimously determined that Doug Fuller was an independent contractor and awarded damages to petitioner. In accordance with their verdict, a judgment was signed on June 19, 1987, in favor of the petitioner and against United States Aircraft Insurance Group in the amount of $574,095.29 together with legal interest from March 1, 1982, until paid and all costs of these proceedings.

On July 17, 1987, a motion and order for suspensive appeal and sufficient bond were filed by respondent, United States Aircraft Insurance Group. In an opinion rendered on August 17, 1988, Judges Marvin, Norris and Lindsey of the Second Circuit Court of Appeal, State of Louisiana, reversed the judgment of the trial court and rendered judgment *de novo* dismissing petitioner's claims at her costs. In order to reach this determination, the Second Circuit found that the trial judge's charge

to the jury on the issue of independent contractor versus employee status was confusing and misleading and, therefore, technically inadequate. The Court stated that:

> The trial judge remarked that he rejected USAIG's proposed charge because it worded the factors in such a way that the jury might infer a preference on the court's part and that this encroached on the prohibition against commenting on the evidence. (citation omitted). The court's caution was well taken, but the pursuit of neutrality resulted in an instruction that is partly unclear and partly incorrect. It did not fairly and reasonably provide correct points of law to be applied to the issues and facts. (citation omitted) The court could have avoided this error by applying the logical and well-organized format of either of the proposed jury charges. (Opinion, p. 9, App. 13a-14a, *infra*)

This technical error in the jury instructions was solely attributable to the trial judge, since the jury charges submitted by both plaintiff and defendant would have been adequate.

After disregarding the factual findings of the jury, the Second Circuit conducted a trial *de novo* from the record of these proceedings. The Court held that because of the technical error in the jury instructions, the "manifestly erroneous" standard was inapplicable in the present case, and substituted its findings of fact for those of the jury. The Court stated:

> Under the usual standard of review, an appellate court should not disturb the factfinder's finding of fact, when the factfinder has made a reasonable evaluation of credibility and the evidence furnishes a reasonable basis for the finding, in the absence of manifest error. (citation omitted) However, when

> the jury instructions are misleading and unclear on a crucial issue, as in the instant case, the appellate court must review the evidence essentially *de novo*, making a fair determination based on the record evidence. (citation omitted) We conclude that the evidence contained in this record is sufficient to support a judgment under the correct legal principles, thus obviating the need for remand for a new trial. (Opinion, p. 10; App. 14a, *infra*)

Seizing the opportunity presented by a technical error in the jury charge, the Second Circuit found that they were not bound by the manifest error rule, and substituted their own findings of fact for those of the jury.

Among the reasons for rehearing[1], the petitioner claimed in paragraphs V and VI that:

"V.

> Where the Legislature has granted the citizens of Louisiana the right to a civil trial by jury, it is error for the Court of Appeal to deny that right and decide the plaintiffs' case on appeal as a trial '*de novo*.' "

"VI.

> The Court of Appeal erred in failing to grant the plaintiffs the right to a civil trial by jury as guaranteed to them under the . . . treaties and Acts of Congress of the United States of America which take precedence over provisions of the Louisiana Con-

[1]This federal question was necessarily raised for the first time in petitioner's application for rehearing. It was not an issue raised in respondent's appeal to the Court of Appeal. And it was not an issue that could have been anticipated or raised prior to the Court of Appeal decision re-examining the facts *de novo*.

stitution . . . ." Application for Rehearing, p. 4; See also Brief in Support of Application, pp. 29-41.

On September 15, 1988, the Court of Appeal denied the application for rehearing. The denial was not accompanied by a written opinion, and listed no reasons for the decision. (App. 2a, *infra*)

The petitioner renewed these contentions in seeking a Writ of Certiorari from the Supreme Court of Louisiana. In the fourth assignment of error, the petitioner contended that "where the legislature [had] granted citizens of Louisiana the right to a civil trial by jury, it [was] error for the Court of Appeal to deny that right by reversing and rendering judgment on appeal as a trial *de novo*, instead of remanding the case to the trial court." The fifth assignment of error in that application was the claim that by reversing the factual findings of the jury and rendering judgment on appeal as a trial *de novo*, the Court of Appeal had failed to grant petitioner "the right to a civil trial by jury as guaranteed to citizens of Louisiana under the treaties and Acts of Congress of the United States which take precedence over provisions of the Louisiana Constitution." Application for Writ of Certiorari, p. 9. Petitioner devoted at least six pages of the argument portion of the Application (pp. 42-48) to setting forth her claims as to that error and to giving reasons why the Louisiana Supreme Court should grant certiorari to review this constitutional issue of first impression. In opposing the Application, the respondent, United States Aircraft Insurance Group, devoted four pages opposing review of this fifth assignment of error. Opposition to Application for Writ of Certiorari, pp. 7-10.

The Supreme Court of Louisiana refused to issue the requested writ, stating simply that appellant's request was "Denied." (App. 1a, *infra*)

REASONS FOR GRANTING THE WRIT

The Seventh Amendment provides that in suits at common law "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Although the State of Louisiana was accepted into the Union on condition that its own system of civil justice not be inconsistent with the principles of the Constitution of the United States, including the Seventh Amendment, it has breached that condition. Louisiana has provided in its Constitution for *de novo* appellate re-examination of facts found by civil juries — in accordance not with "the rules of the common law," but with the French civil law tradition.

This case is a vehicle for testing Louisiana's right to break its promises, both to its inhabitants and to the Union, to adhere to the Seventh Amendment principle respecting appellate review of jury fact findings. There are compelling reasons why this Court should review this matter.

I

The Decision Below Raises Important And Unique Questions As To Louisiana's Obligation To Maintain A Civil Justice System Not Inconsistent With The Seventh Amendment.

This case involves critical and unique questions arising out of Louisiana's admission to the Union in 1812, a time when the Seventh Amendment was an integral part of the United States Constitution. Did Louisiana, in achieving statehood in accordance with the relevant treaties and organic acts of Congress, promise its inhabitants and the Union of which it became a member that its state constitution and laws would at no time be inconsistent with the civil jury trial principles embodied in

the Seventh Amendment? Can Louisiana break such a commitment and create a civil jury trial system in the mold of the French civil law tradition? Do the Constitution, treaties and laws of the United States permit one state only — Louisiana — to provide for *de novo* appellate fact-finding in the context of a civil jury trial proceeding?

This Court has never addressed those questions. True, it has held that the states, and Louisiana in particular, are not directly subject to the Seventh Amendment's guarantee of a jury trial in civil actions. As was said in *Walker v. Sauvinet*, 92 U.S. 90, 92 (1876), "the States, so far as this Amendment is concerned, are left to regulate [civil] trials in their own way." To the same effect is this Court's summary affirmation of the three-judge court ruling in *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La. 1972), *aff'd* 409 U.S. 943 and 1098 (1972).

But those cases do not purport to address or resolve the questions posed here. The Fourteenth Amendment does not compel Louisiana to incorporate the Seventh Amendment limitation of appellate re-examination of facts to those areas permitted by "the rules of the common law" into its own system of justice. However, the fact that this Seventh Amendment principle may not be so fundamental to an ordered scheme of liberty as to be incorporated by the Fourteenth Amendment is no answer to the problems raised in this petition. What of a state like Louisiana which, as a condition of its acceptance into the Union, has voluntarily promised to abide by the principles of the Seventh Amendment? No other state in the Union has ignored the principles of the Seventh Amendment in establishing a civil justice system.

The importance and substantiality of the problem is obvious from an account of the treaty and statutory events leading to Louisiana's admission to the Union in 1812.

In April, 1803, the President of the United States of America and the First Consul of the French Republic entered into a treaty in Paris by which the Province of Louisiana was to be ceded to the United States. This treaty was ratified in Washington, D.C., on October 21, 1803. Article III of that treaty provided that the inhabitants of the Province of Louisiana "shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States . . . ." Cession of Louisiana, Treaty of 1803, Article III. (App. 27a, *infra*) It will be remembered that the Federal Constitution was adopted in 1787; and the first ten amendments to that Constitution were ratified only four years later in 1791. At the time the United States entered into the Treaty of 1803 with France, the Seventh Amendment, guaranteeing the right to civil trial by jury and prohibiting the re-examination of any facts found by a jury, was an integral part of the Federal Constitution.

By Act of Congress dated March 26, 1804, the Province of Louisiana was divided into two territories, and a temporary government was formed. That act provided in Section 4 that no law would be valid in the newly formed territories which was inconsistent with the Constitution and laws of the United States. It further provided for trial by jury in all cases, both civil and criminal, if either of the parties required it. 2 U.S. Stat. 283 § 5. This was confirmed by Act of Congress, March 3, 1805, which established the territorial government of Orleans and provided that the new Territory of Orleans should establish a government in all respects similar to that established in the Mississippi Territory, and that the inhabitants of the Territory of Orleans should be entitled to and enjoy all the rights, privileges and advantages enjoyed by the people of the Mississippi Territory. The people of the Mississippi Territory

enjoyed the right to trial by jury in civil actions. The act further established that the inhabitants of Orleans were authorized to form a constitution and state government. The only restrictions upon that government were that the constitution should be republican and that it should not be inconsistent with the Constitution of the United States. At that time, the Seventh Amendment to the Constitution provided for civil trial by jury, and prohibited the re-examination of any facts found by a jury. (See App. 28a-29a, *infra*)

On February 20, 1811, an Act of Congress was passed authorizing the people of the Territory of Orleans to form a constitution and state government in anticipation of admission of the state into the Union. This enabling act again required that the constitution to be formed should be republican and consistent with the Constitution of the United States. Pursuant to the Enabling Act of 1811, the Territory of Orleans formulated a constitution which was submitted to Congress for approval in 1812. There was no reference to civil jury trials in that constitution, and the only reference to appellate jurisdiction was contained in Article 4, Section 2, providing that the Supreme Court should have appellate jurisdiction only and that its jurisdiction should extend to all civil cases where the matter in dispute exceeded the sum of $300.00. (App. 31a, *infra*) Although the Constitution as submitted to Congress did not contain all of the rights guaranteed by the United States Constitution and Bill of Rights, it could not be said to be inconsistent with the Constitution of the United States and was, therefore, approved. There was no mention of appellate review of facts in the Louisiana Constitution as approved by Congress in 1812. (App. 29a, *infra*)

After approval of the Constitution of 1812, an Act of Congress was passed on April 8, 1812, by which the State of Louisiana was admitted into the Union. It was provided in the Act of Admission that all terms and conditions contained in the third

section of the Enabling Act were considered fundamental conditions and terms upon which the State of Louisiana was incorporated into the Union. Section 3 of the Enabling Act had provided in part that the Constitution to be formed by the State of Louisiana should be consistent with the Constitution of the United States. It was further provided in Section 3 of the Act of Admission that the judge of the Supreme Court in the State of Louisiana should have the same jurisdiction and powers which were given to the District Judge of the Territory of Orleans. No judge within the Territory of Orleans had the power to review facts found by a jury. (See App. 29a-30a, *infra*)

It was not until 1906, almost 100 years later, that the Constitution of the State of Louisiana was amended to provide for appellate review of facts. (App. 31a, *infra*) This provision was inconsistent with the Seventh Amendment to the Constitution of the United States. It also violated the Enabling Act and the Act of Admission whereby the Territory of Louisiana became the State of Louisiana. When Louisiana was ceded to the United States by treaty with France, its inhabitants were promised admission into the Union in accordance with the principles of the Federal Constitution. When Louisiana became a territory, its inhabitants were expressly promised the right to trial by jury. Act of Congress March 26, 1804, c. 38, 2 U.S. Stat. 283. When Louisiana sought statehood, its inhabitants were promised a state constitution consistent in all respects with the Federal Constitution. The citizens of the resulting State of Louisiana have been seeking unsuccessfully to secure these rights for themselves ever since, and now ask this Court to enforce the jury trial promises contained in the treaties and Acts of Congress by which Louisiana became a state.

This Court has held that where there is a conflict between a treaty and the provisions of a state constitution or of a state statute, the treaty will control. *Zschernig v. Miller*, 389 U.S.

429, (1968); *Baker v. Carr*, 369 U.S. 186, (1962). The same is true of an Act of Congress. U.S. Const. Art. VI. If treaties and Acts of Congress of the United States are the supreme law of the land, and if they supersede prior and subsequent state constitutional and statutory provisions, there should be no question that the citizens of the State of Louisiana are guaranteeed the right to trial by jury. The issue presented by this case is not whether the right to a meaningful trial by jury is fundamental to a system of ordered liberty, but rather whether the treaties and Acts of Congress by which Louisiana became a state are superior to a subsequent and inconsistent state constitutional provision.

The answer to that issue does not depend upon how fundamental or significant may be the right to a jury trial in a civil tort action. The critical point is that this jury trial right, along with many others, was promised to the citizens of the newly founded State of Louisiana. To allow the State Legislature almost 100 years later to circumvent this promise by constitutionally adopting appellate review of facts, a provision blatantly inconsistent with the Seventh Amendment to the United States Constitution, would be to undermine the lasting efficacy of this nation's treaty-making power. For if the citizens of the sovereign states making up this nation may not call upon the United States government to enforce its promises given to those citizens both in treaties and Acts of Congress, how can the citizens of foreign governments be expected to treat our promises with respect?

II.

The Decision Below Raises A Critical Problem Concerning Whether Appellate Re-examination Of Jury-Found Facts, In A Manner Contrary To Common Law Rules, Abrogates The Seventh Amendment Right To A Jury Trial.

The Seventh Amendment provides in part that "no fact found by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The rules of the common law require that "questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative." *Walker v. New Mexico & S.P.R. Co.*, 165 U.S. 593, 596 (1897). The rules of the common law do not permit an appellate court to conduct a *de novo* review of a civil jury trial and render judgment based upon its own findings of fact instead of the jury's. The basic question here presented is whether those common-law rules are so integrated with the Seventh Amendment's "right of trial by jury," that a violation of those rules effectively abrogates the right of trial by jury.

This Court has held that when the verdict of the jury is based upon the failure of the trial court to direct a verdict for the defendant, a new trial must be awarded. The appellate court is not permitted under the Seventh Amendment to direct that a judgment be entered on appeal which is contrary to the jury verdict, even though that practice may be authorized by state statute. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1912). In discussing the Seventh Amendment prohibition of re-examination of facts by an appellate court, this Court has stated:

> This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other

> manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings. *Parsons v Bedford,* 3 Pet. 433, 7 L.Ed. 732 (1830) at 447, 448.

When an error of law affecting the validity of a jury verdict is committed by the trial court, the only remedy permitted by the Seventh Amendment is remand of the case to the trial court for a new trial. See also *United States v. Wonson,* 1 Gall. 5, 20 Fed. Cas. No. 16,750 (1812); *Capital Traction Co. v. Hof,* 174 U.S. 1 (1899).

In the present case, the Court of Appeal below has not only reversed the findings of the jury, but has entered judgment in accordance with its own findings of fact based upon a *de novo* review of the record. The court justified its review of the facts found by the jury by holding that there was an error in the jury instructions, stating that "a verdict based on instructions that were faulty in a critical regard need not be bound by the manifest error rule." (Opinion, p. 5; App. 8a, *infra*) The jury instructions were declared to be defective, not because they contained any error of law, but because they were considered by the court to be "unclear." (Opinion, p. 9; App. 13a, *infra*). Once the court had determined that the jury instruction was unclear, it found that the way was open for its *de novo* review of the facts:

> Under the usual standard of review, an appellate court should not disturb the factfinder's finding of fact when the factfinder has made a reasonable evaluation of credibility and the evidence furnishes a reasonable basis for the finding, in the absence of manifest error. (citation omitted) However, when

> the jury instructions are misleading and unclear on a crucial issue, as in the instant case, the appellate court must review the evidence essentially *de novo*, making a fair determination based on the record evidence. (citations omitted) We conclude that the evidence contained in this record is sufficient to support a judgment under the correct legal principles, thus obviating the need for remand for a new trial. (Opinion, p. 10; App. 14a, *infra*)

The court devoted over ten (10) pages of its opinion to an exhaustive review of the evidence presented in the trial court. This type of re-examination of facts found by a jury would not be permitted under the rules of common law as incorporated into the Seventh Amendment.

The court did not find that the jury's verdict was manifestly erroneous, nor did it note any egregious or manifest error in the proceedings in the trial court. The reasons announced by the court for its reversal of the jury's findings are contrary to every principle protected by the Seventh Amendment.

It has already been firmly established that no state may be compelled under the Fourteenth Amendment to grant its citizens a Seventh Amendment right to civil jury trial. The protections afforded to the fact-finding process by the Seventh Amendment are, therefore, not binding upon Louisiana's state courts through the Fourteenth Amendment. However, Louisiana has chosen to grant its citizens the right to request a Seventh Amendment civil trial by jury when the amount in dispute exceeds $20,000.00, exclusive of interest and costs. (La. Code of Civ. Proc. arts. 1731, 1732, App. 33a, *infra*) Although not contained in the Louisiana Constitution of 1812, this right was suggested by the Livingston Committee in 1823 and incorporated into the Louisiana Code of Practice of 1825. The Supreme Court of the State of Louisiana has held the right

to civil trial by jury to be absolute where it has been legislatively granted, and where all requirements of the Code of Practice have been met. *Parish v. Holland,* 166 La. 24, 116 So. 580 (1928).

The right to civil jury trial had been afforded equal dignity in earlier Louisiana cases. In 1825, the Louisiana Supreme Court held that where testimony was erroneously allowed to come before a jury, the case must be remanded for a new trial. *Bowman v. Flowers,* 2 Mart. (n.s.) 267 (La. 1825). In that case the court stated:

> It has been strongly urged on us, that even rejecting this evidence, there is still enough on the record to enable us to affirm the verdict. This position brings directly before us the question, whether, in cases of this kind, which are emphatically proper to be tried by a jury of the vicinage, this court can, with propriety, take on it to decide the cause on other evidence, than that, on which the jury passed. The weight, which is properly attached to a verdict in such cases seems to forbid us doing so. The plaintiff had a right to demand, and did in fact, pray for a jury in the court below, and he had of course, a right that they should pass on his case on legal evidence alone, so that he might have the benefit, when his cause came here, of that presumption in his favor, which a verdict would have created. It follows then, that if the chance to obtain this advantage has been taken from him, by the act of the opposite party, or the error of the judge, he has a right to have his cause tried again. 2 Mart. (n.s.) at 272.

Thus, the court was able to give effect not only to the doctrine of appellate review of facts, but also to the legislatively recognized right to jury trial.

Prior to the decision in this case, there would have been little doubt that findings of fact made by a trial court could not be disturbed on appeal unless deemed "manifestly erroneous" by the appellate court. *Comment*, 21 La. L. Rev. 402 (1961). This was true of both jury and non-jury cases, and stems, not from any particular respect for the verdict of a civil jury, but rather from the deference which is to be paid to the findings of any trier of fact who has had the opportunity to judge the credibility of witnesses first-hand. It has been stated that "(a)t its inception, the manifest error rule was intended to operate as a limitation upon the freedom with which the factual determinations of a trial court could be overturned . . . ." Lobrano, *Civil Procedure-Remand-Right to a Jury Trial*, 41 Tul. L. Rev. 922, 922 (1967). In formulating the manifest error rule, the courts of the State of Louisiana struck a delicate balance between the uniquely civilian doctrine of appellate review of facts and the sanctity of trial court findings of fact.

This delicate balance becomes crucial, however, when a jury trial is demanded and granted under Louisiana Code of Civil Procedure Articles 1731-1733. Judge Wisdom, speaking for a federal three-judge district court, has stated that:

> The law of this state is unique. Nevertheless, its lawmakers, legislative and judicial, have managed to work out compromise procedures compatible with Louisiana's civilian heritage and with the Anglo-American concept of due process. There is appellate review on the facts as well as on the law, but it is subject to the requirement that factual findings of a trial court or the verdict of a jury should be disturbed only when they are manifestly erroneous. *Melancon*, 345 F. Supp. at 1047.

It is apparent that the *Melancon* decision was strongly influenced by what that court perceived to be a balancing of civil law

doctrine and personal liberties. That balance no longer exists. If Louisiana courts are allowed to reverse the factual findings of a civil jury when a technical error is made by the judge, and render judgment *de novo* giving no weight whatsoever to the jury's findings of fact, then the civil jury trial in Louisiana has become, in Judge Wisdom's words, no more than an expensive "exercise in futility." *Melancon*, 345 F. Supp. at 1028.

The question presented by this case is not whether the Due Process Clause of the Fourteenth Amendment requires the State of Louisiana to grant its citizens the right to civil trial by jury. That question was rendered moot in 1825 when the Louisiana Legislature adopted the Seventh Amendment's right to trial by jury in its original Code of Practice. This petition requests this Court to determine what sanctity, if any, must be given to the findings of fact made by a legislatively-authorized Seventh Amendment jury.

The question presented is not limited to the denial of this petitioner's rights. It has far-reaching implications and sets a dangerous precedent for the courts of every state. Where the citizens of a state through their elected legislative officials have appropriated for themselves certain constitutional rights and liberties, may those rights be judicially circumvented and abolished?

The issue presented is crucial because of its subtlety. The State of Louisiana has not repealed the right to civil jury trial. Such a direct attack upon the freedom of its citizens would raise cries of protest across the state. Instead, the courts of this state have been allowed to abolish the protections afforded to litigants by the civil jury trial under the guise of appellate review of facts. This Court must be wary whenever such subtle attacks are launched against those freedoms protected by our Bill of Rights.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 8, 1989

APPENDIX

The Supreme Court of the State of Louisiana

DEBORAH HANSON FULLER, INDIVIDUALLY
AND AS PROVISIONAL TUTRIX OF THE MINOR,
JAY BRIAN FULLER

VS. NO. 88-C - 2537

UNITED STATES AIRCRAFT INSURANCE
GROUP AND CHICAGO INSURANCE COMPANY

IN RE: Fuller, Deborah Hanson; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Second Circuit, Number 19805-CA; Parish of Caddo 1st Judicial District Court Div. "D" Number 285-611

00000000

December 9, 1988

Denied.

JAD
WFM
JLD
JCW
HTL
LFC

Supreme Court of Louisiana
December 9, 1988

/s/ Frans J. Labranche Jr.
Clerk of Court
For the Court

STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, La. 71101
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To: Sydney Nelson, Esq.
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Shreveport, Louisiana: September 15, 1988

Docket Numer: 19805-CA

Fuller, Deborah

vs.

United States

BEFORE JUDGES: HALL, MARVIN, SEXTON, NORRIS, LINDSAY,

As counsel of record in the captioned case, you are hereby notified that the application for rehearing filed by Plaintiff/ Appellee has this day been DENIED.

FOR THE COURT
Diana P. Heisler
Clerk of Court

cc: Dermot McGlinchey Esq
J.W. Jones Esq.
Frank Walker Jr. Esq.

No. 19,805-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * * * * *

DEBORAH HANSON FULLER, Individually and as Provisional Tutrix of the Minor, JAY BRIAN FULLER — Plaintiff/Appellee

versus

UNITED STATES AIRCRAFT INSURANCE GROUP and — Defendant/Appellant

CHICAGO INSURANCE COMPANY — Defendant/Appellee

* * * * * * * *

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana

Honorable Carl E. Stewart, Judge

* * * * * * * *

NELSON, HAMMONS & JOHNSON
by: Sydney B. Nelson — Attorneys for Plaintiff/Appellee

McGLINCHEY, STAFFORD, MINTZ, CELLINI & LANG
by: Kenneth H. LaBorde — Attorneys for Defendant/Appellant United States Aircraft Insurance Group

BODENHEIMER, JONES, KLOTZ & SIMMONS
by: J.W. Jones — Attorneys for Defendant/Appellee Chicago Insurance Company

LUNN, IRION, JOHNSON,
SALLEY & CARLISLE
by: Frank M. Walker, Jr.

Attorneys for
Intervenor
Commercial Union
Insurance Company

* * * * * *

Before MARVIN, NORRIS and LINDSAY, JJ.

NORRIS, Judge

This is a suit for wrongful death resulting from the crash of a private Beech Bonanza A36TC airplane. The plaintiff's decedent, Doug Fuller, was a passenger in Blanco Oil Company's plane that crashed shortly after takeoff on May 28, 1981. The litigation encompassed many parties and incidental actions, but by the time the case went to the jury after a long trial, the only remaining defendants were Blanco Oil's primary insurer, United States Aircraft Insurance Group (''USAIG''), and its umbrella insurer, Chicago Insurance Company (''Chicago''). The jury rendered verdict in favor of the plaintiff and assessed 57% of the fault to the defendants' insured, Blanco Oil, and Blanco's president, Mr. Joe Bob White. The jury set damages slightly in excess of $1,000,000, including $400,000 and $200,000 to Mrs. Fuller and her minor son respectively for loss of support. After rendition of verdict but before entry of judgment, the claims against Chicago were settled, leaving only USAIG cast for White's and Blanco's portion of the damages. USAIG has appealed, and Mrs. Fuller has answered the appeal, raising the following issues:

(1) Was the jury clearly wrong in finding that Mr. Fuller was an independent contractor for, rather than an employee of, White or Blanco?

(2) Was the trial court's jury charge as to distinguishing between an independent contractor and an employee unclear? and

(3) Was the award of $600,000 for loss of support inadequate?

Concluding that USAIG's arguments have merit, we reverse and render.

FACTS

In the late 1970s Joe Bob White, an oil man of long standing, started a number of companies in the petroleum business. His oil development company, White & Bancroft, was in the business of exploring for oil and drilling wells. Blanco Oil was established to operate and manage the completed wells. Banjo Inc. was to provide oilfield services. These entities were closely allied and were practically White's alter ego. Most of their activities were in a field near Haynesville. Although White was quite knowledgeable about the oil patch, he was not himself a petroleum engineer.

In early 1980 White announced he would be hiring his "close friend," Doug Fuller, as petroleum engineer. White had known Fuller for several years, since Fuller had been in college and engaged to White's daughter's roommate. White apparently agreed to hire Fuller after he completed his term in the air force in 1980. Several witnesses testified that Fuller, the younger man, looked to White as a "second father." Starting in February 1980, Fuller worked, without a written contract, for White's companies in Shreveport and at the Haynesville field, and for no one else. Mrs. Fuller testified that White's enterprises kept her husband very busy during this time. White paid Fuller a specified semimonthly sum (at the time of his death it was $1,500 twice a month) with no withholdings for income taxes or FICA. He also did not pay unemployment tax for Fuller. Fuller filed tax returns as a self-employed professional person, submitting quarterly estimates for income tax and self-employment tax.

In most other respects, however, the arrangement appeared to be a typical employment relation. White provided Fuller with office space, supplies and secretarial help without requiring reimbursement. He also provided free of charge a car, auto insurance and gas company credit card. White even carrried Fuller on Blanco's hospitalization plan and provided him life insurance at no charge. At the same time White was also carrying several employees of an unrelated company, Lu-Chem, on Blanco's hospitalization plan, but this was for the latter's convenience and with the clear understanding that Lu-Chem was to repay White in the future. The premiums were in fact repaid. Fuller put in regular hours and worked very closely with White. As to the nature of Fuller's work, Blanco's secretary-treasurer, Mr. Ferguson, testified that although Fuller's work was result-oriented, White retained the primary responsibility and authority as to what was done and when. R.p. 1896.

In early 1981, Fuller's actual father, an operations manager for Gulf Oil, gave Fuller a lead on some subleases in Midland, Texas, that Gulf was about to let. Fuller passed on this information to White; it represented a potentially profitable expansion that they wanted to explore. Blanco bought a used Beech A36TC to facilitate travel. White was a certified pilot but had not flown in over three years, except for a biennial recertification session with flight instructor Gene Rosa a few days before the fatal crash. Fuller was also a certified pilot, having flown a KC135 in the air force, but he never flew Blanco's Beechcraft. On May 28, 1981, White and Fuller boarded the plane to fly to Midland. Apparently White was the pilot and Fuller was in the front; Blanco's rig superintendent and his wife, Mr. and Mrs. McDonald, were passengers in the rear. They took off from Shreveport downtown airport, Runway 23, at 8:32 that morning.

Shortly after takeoff the pilot radioed the tower that his cockpit door was open and he needed to land the craft. Permission was granted to return to Runway 23 and the airplane began a turnaround maneuver that appeared somewhat irregular to the air traffic controllers, who radioed him that he could return to either Runway 23 or Runway 14. Two or three times they advised him to watch his altitude. The plane stalled at about 500 feet and crashed in a field one-half mile northwest of the airport, killing all the occupants.

Mrs. Fuller brought suit individually and on behalf of her minor son, Jay Fuller, who was only a few months old at the time of the accident. As noted, she sued USAIG and Chicago, the insurers of Blanco and Joe Bob White. She also sued Beech Aircraft Company, alleging the company had known for years that its cockpit doors did not close satisfactorily, thus creating a hazard especially at takeoff; and Gene Rosa's insurer, Employers Casualty Company, alleging that Rosa's recertification flight did not adequately address emergency procedures. There were numerous incidental demands, notably the intervention of Commercial Union, Blanco's workers comp carrier; Mrs. Fuller had brought a separate suit against Commercial Union in the event her husband was determined to have been Blanco's employee. As noted, all claims were settled except the principal demand against USAIG and Chicago, reducing the issues to Fuller's status as an employee or independent contractor; the allocation of fault, if any, to White and Fuller; and quantum.

The jury found that Fuller was an independent contractor for Blanco and therefore not confined to the exclusive remedy of workers compensation. The jury allocated fault as follows:

Joe Bob White	57%
Gene Rosa	27

Beech Aircraft	16
Doug Fuller	0

The jury set damages at $1,000,000, including $600,000 for loss of support and $400,00 for loss of love and affection. Funeral expenses were also awarded.

Chicago settled with Mrs. Fuller before the verdict was reduced to judgment. The court rendered judgment against USAIG for $570,000 plus 57% of funeral expenses. From this judgment USAIG has appealed and Mrs. Fuller has answered the appeal.

JURY INSTRUCTIONS

By its second assignment USAIG contends the trial court failed to explain the significance of the various factors to be weighed by the jury in deciding whether Fuller was an employee or an independent contractor. Fuller's status was the most important issue at trial and any deficiency in the instructions, according to USAIG, would mandate setting aside the verdict. We have considered this assignment first because of the effect of erroneous instructions on the standard of review; a verdict based on instructions that were faulty in a critical regard need not be bound by the manifest error rule. *Laborde v. Velsicol Chem. Corp.*, 474 So.2d 1320 (La. App. 3d Cir. 1985), writ denied 480 So. 2d 738 (La. 1986).

Adequate jury instructions are those that fairly and reasonably point up the issues and provide correct principles of law for the jury to apply to those issues. *Sparacello v. Andrews*, 501 So.2d 269 (La. App. 1st Cir. 1986), writ denied 502 So.2d 103 (La. 1987); *Laborde v. Velsicol Chem. Corp ., supra; Lincecum v. Missouri Pacific R. Co.*, 452 So.2d 1182 (La. App. 1st Cir. 1984), writ denied 458 So.2d 476 (La. 1984). The trial judge is not required to give the precise instructions

submitted by the litigants; he need only give instructions that properly reflect the applicable law and adequately convey the issues to the jury LSA-C.C.P. art. 1792; *Schoonmaker v. Capital Towing Co.*, 512 So.2d 480 (La. App. 1st Cir. 1987), writ denied 514 So.2d 458 (La. 1987); *Marler v.Rent-It Co.*, 490 So.2d 784 (La. App. 3d Cir. 1986). Even if the requested instructions are fair statements of the law, the trial judge need not include them verbatim but must strike a fair balance so that no one issue is unduly emphasized. *Wilson v. Aetna Cas. & Sur.Co.*, 401 So.2d 500 (La. App. 2d Cir. 1981); *Folse v. Fakouri*, 371 So.2d 1120 (La. 1979).

USAIG argues the trial judge's charge did not precisely instruct the jury how to weigh its findings and properly apply them to reach the correct legal conclusion. USAIG's proposed jury charge No. 15 begins by instructing the jury to balance eleven listed factors which bear on the degree of control that White had the right to exercise over Fuller. Each factor contains a statement that would support a finding of employee status but begins with the conjunction "whether," to indicate alternative conditions. For instance, the second factor reads, "Whether the services performed by Fuller were an integral part of Blanco Oil Company's business." Each of the factors is similarly phrased. The instruction then advises that an affirmative finding weighs in favor of an employment relationship, and finally notes the jury should consider the total economic relationship between the parties.

The plaintiff's proposed jury charge is similar to USAIG's. It lists eight factors and each is followed by a long explanation of the precise manner of weighing the evidence. For instance, the seventh factor is entitled "Nature of the Business" and reads as follows:

7. *Nature of the Business*

> If you find that the nature of the business or occupation of the person performing the services is independent of the nature of the principal's business, an independent contractor/principal relation is indicated.

As noted, each of the factors carries a similar explanatory instruction.

By contrast, the court's actual charge does not provide a point-by-point recitation of how each factor should be weighed, even though the parties either submitted this type of explanation or a general instruction that clarified the weighing. The court's charge begins by quoting LSA-R.S. 23:1021 to say that a contractor renders service for a specified price or a specified result under control of the principal as to results only and not as to means. It further states that each case must be decided on its own particular facts. This fairly and reasonably states the law. *Sones v. Mutual of Omaha Ins. Co.*, 272 So.2d 739 (La. App. 2d Cir. 1973), writ denied 273 So.2d 292 (La. 1973); *Amyx v. Henry & Hall*, 227 La. 364, 79 So.2d 483 (1955).

However, when the instruction addresses how to weigh the factors, it becomes unclear. There is a general instruction which states:

> It is not necessary that all of these elements be present in every case to render a person who performs service for another an independent contractor; nor is the absence of any element to be considered decisive. You are to consider the overall relationship between the parties, and the elements listed above are intended to give you guidance in that respect only.

The very first factor shows the difficulty. It reads:

> (1) The degree of control exercised by the principal over the work performed.

The "degree of control" is obviously a sliding scale; the greater the control, the more likely an employment relation. "Control" is not an element that is either present or absent; it is present to a greater or lesser degree. If a great degree of control is present, however, then this would not render the worker an independent contractor, as the general instruction would suggest. We are constrained to conclude that the trial court's first factor is not clearly stated to conform to the general instruction, and even if it could be clarified by the jury, it would imply the wrong conclusion.

The same kind of confusion riddles the other factors as well. Factor No. 4 refers to:

> (4) The manner in which the worker is carried on the payroll of the principal.

The "manner" of payment is like the "degree" of control; it is neither present nor absent. The phrasing of the factor does not correspond to the general instruction, and offers no guidance whatsoever as to the weighing of the evidence. Factor No. 6, referring to the "source of the materials used by the worker," suffers from the same lack of clarity.

Even more disturbing, however, is the erroneous implication provided by Factors Nos. 7 and 8. They provide as follows:

> (7) Whether the worker performing the services is an integral part of the principal's business or whether he is independent of the principal's business.

(8) Whether a person performs work for a principal on a continuing and exclusive basis.

The *positive* assertion of these factors is that a worker is performing services integral to the principal's business and that he is performing work on a continuing and exclusive basis. The general instruction indicates that if these factors are present, a finding of independent contractor is justified. This conclusion is plainly wrong. Performing work that is an integral part of the principal's business is indicative of employment status. *Durant v. Industrial Lumber Co.*, 6 So.2d 164 (La. App. 1st Cir. 1946); cf. LSA-R.S. 23:1035. Likewise, performing work for the principal on a continuing and exclusive basis is indicative of employment. *Sones*, supra, *Malone & Johnson*, 13 La. Civil Law Treatise (Workers' Compensation) § 74 (1980, with 1987 p.p.).

We have reviewed the remainder of the factors to see if perhaps all of them were simply stated backwards, making assertions that implied employee status. However, Factors Nos. 3 and 5 provide:

(3) Whether the worker renders service for a specified price to be paid for a specified result either as a unit or as a whole.

(5) The right by the worker, whether exercised or not, to hire helpers and assistants.

In both instances, the positive assertions (that work is done for a specified price per unit or whole, and the worker has the right to hire helpers) are indicative of an independent contractor situation. LSA-R.S. 23:1021(6); Malone & Johnson, *op. cit.*, § 79. Thus the presence of these factors would substantiate a finding of the contractor relationship, as the general instruction suggests.

In summary, the manner in which the factors are stated creates considerable confusion as to the proper assessment of the evidence. Some of them apply directly; some of them do not conform to the general provisions; and some squarely lead to the wrong conclusion. In this state of affairs, we could not reasonably hold the instructions "adequate" on this most crucial aspect of the case.

We realize that factors as such are subordinate to the overall consideration of the "total economic relationship" of the parties. We are reluctant to hold jury instructions inadequate. However, given the sparsity of evidence as to the exact nature of White and Fuller's relationship, the individual factors must assume a greater significance. We cannot avoid the conclusion that they were unclear enough on the critical issue to mislead the jury.

We would also note an omission from the trial court's charge. USAIG requested instructions as to the fringe benefits that Fuller received from White. The evidence showed that these benefits were considerable and were a significant element of the "overall economic relationship" between the parties. *Sones*, supra. The trial court declined to give this instruction. The instructions should encompass the applicable facts. *Lincecum v. Missouri Pacific R.Co.*, supra; *Reeder v. Allstate Ins. Co.*, 235 So.2d 111 (La. App. 4th Cir. 1970), writ denied 256 La. 615, 237 So.2d 397 (1970); *Miller v. Fogleman Truck Lines*, 398 So.2d 634 (La. App. 3d Cir. 1981), writ denied 401 So.2d 358 (La. 1981). We feel the instructions should have conformed to this significant aspect of the case.

The trial judge remarked that he rejected USAIG's proposed charge because it worded the factors in such a way that the jury might infer a preference on the court's part and that this encroached on the prohibition against commenting on the

evidence. LSA-C.C.P. art. 1791; R.p.p. 193 1940. The court's caution was well taken, but the pursuit of neutrality resulted in an instruction that is partly unclear and partly incorrect. It did not fairly and reasonably provide correct points of law to be applied to the issues and facts. *Laborde v. Velsicol Chem. Corp.*, supra. The court could have avoided this error by applying the logical and well-organized format of either of the proposed jury charges. This assignment of error has merit. We have therefore examined the evidence under the appropriate legal standard to determine whether it proves an employee or independent contractor status.

CONTRACTOR STATUS

By its first assignment of error, USAIG contends the preponderance of evidence adduced at trial clearly established that Fuller was an employee of Blanco or White, and thus the evidence does not support the jury's verdict of contractor status. USAIG characterizes the evidence in favor of employee status as "overwhelming."

Under the usual standard of review, an appellate court should not disturb the factfinder's finding of fact, when the factfinder has made a reasonable evaluation of credibility and the evidence furnishes a reasonable basis for the finding, in the absence of manifest error. *Canter v. Koehring Co.*, 283 So.2d 716 (La. 1973). However, when the jury instructions are misleading and unclear on a crucial issue, as in the instant case, the appellate court must review the evidence essentially *de novo*, making a fair determination based on the record evidence. *Lincecum v. Missouri Pacific R. Co.*, supra; *Laborde v. Velsicol Chem. Corp.*, supra. We conclude that the evidence contained in this record is sufficient to support a judgment under the correct legal principles, thus obviating the need for remand for a new trial.

The primary source of law is the workers compensation statute, which defines an independent contractor as:

> any person who renders service, other than manual labor, for specified recompense for a specified result, either as a unit or as a whole, under the control of his principal as to the results of his work only, and not as to the means by which such result is accomplished. LSA-R.S. 23:1021(6).

The statute further provides:

> A person rendering service for another in any trades, businesses or occupations covered by this Chapter is presumed to be an employee under this chapter. * * * LSA-R.S. 23:1044.

We acknowledge dicta in two cases to suggest that when an injured worker files suit alleging contractor status, a different presumption might perhaps apply. *Allgood v. Loeb,* 22 So.2d 568 (Orl. Cir. 1946), rev'd 210 La. 594, 27 So.2d 380 (1946); *Sones v. Mutual of Omaha,* supra. One noted commentator disagrees, stating that even if the claimant asserts he is a contractor, he must apparently overcome the statutory burden. Malone & Johnson, *op. cit.,* § 85; see also *Maurice v. Orleans Parish Sch. Bd.,* 295 So.2d 184 (La. App. 4th Cir. 1974). Given the humanitarian objective of the statute to cover as many workers as possible, and the compromise of relinquishing the tort remedy for claimants, we are inclined to apply R.S. 23:1044 to this case, in accord with Prof. Johnson's analysis.

The term "independent contractor" connotes a freedom of action and choice with respect to the undertaking in question as well as a legal responsibility on the part of the contractor in case the agreement is not fulfilled in accord with its

covenants. *Hickman v. Southern Pac. Transp. Co.*, 262 La. 102, 262 So.2d 385 (1972). The inquiry to determine whether a relationship is that of independent contractor or of employment hinges on a principal test: the control over the work reserved by the principal. The amount of supervision and control actually exercised is not the crucial question, but rather the amount of supervision and control reserved by the principal from the nature of the relationship. *Amyx v. Henry & Hall,* supra. Each case must be decided on its own facts, taking into special consideration the *total economic relationship* between the parties. *Sones v. Mutual of Omaha,* supra; *Shepherd v. Martin,* 448 So.2d 223 (La. App. 1st Cir. 1984).

As a guide to analyzing the evidence in particular cases, this court has taken into account various factors that weigh either against or in favor of an employment relationship. *Sones,* supra, 272 So.2d at 742. At trial of the instant case, the parties both submitted a list of factors synthesized from *Sones* and from *Hickman,* supra, and *Amyx,* supra. The trial court adopted eight of these suggested factors, to which appellant objected not because they were inapplicable but because they were incomplete and lacked adequate explanation. Appellant's objections were meritorious, as already discussed, but for the sake of convenience we have adapted the trial court's listing of factors to our discussion, making the necessary changes and additions to show how each one bears on the critical issue of control.

The salient features of the total economic picture include the fact that Fuller performed valuable professional services for White, and these services were an important part of White's business; although White could not ultimately dictate the means of Fuller's work, he had total authority to assign and direct work; he appeared to work very closely with Fuller; there was no written contract but there was a definite payment scheme; Fuller was almost totally financially dependent

on White, who apparently had the right to discontinue Fuller's services without notice; and Fuller worked exclusively for White for 16 months, from early 1980 until the accident. This overview would suggest that White retained significant control over Fuller in the business enterprise.

The proof in this case was difficult because both of the people involved were obviously unavailable to offer their perceptions of the relationship or to describe accurately how they transacted business together. We feel this dearth of evidence underscores the importance of the factors, which we have analyzed as follows:

1. The degree of supervision and control actually exercised by the principal over the work performed. As already noted, this factor is highly indicative of reserved control. *Sones v. Mutual of Omaha,* supra; *Hemphill v. State Farm Ins. Co.,* 472 So.2d 320 (La. App. 3d Cir. 1985). In accord with R.S. 23:1021, courts have held that control over the end result, without the right of supervising the manner in which the work is perfomed, is suggestive of an independent contractor relationship. *Lushute v. Diesi,* 354 So.2d 179 (La. 1977); *Kamm v. Morgan,* 157 So.2d 118 (La. App. 4th Cir. 1963).

Mr. Ferguson testified that everyone in Blanco's "close knit operation" looked primarily to White for supervision or guidance in his job duties and that White had "primary responsibility" over the work. R.p. 1896. While Mr. Ferguson once described Fuller's work as "result oriented," R.p.1910, this was not the thrust of his testimony. A passage cited by appellants in brief underscores the ambiguity.[1] Ms.McMullen

1. Q. Were there ever occasions when you heard Mr. White ask Mr. Fuller to take care of some task?

   A. Usually he had a lot of discretion as to what needed to be done and when. Now, sometimes, yes, he would suggest to Doug that certain things needed to be done and Doug would proceed forthwith. R.p. 1896.

testified that White usually knew what Fuller was doing and that Fuller would have done whatever White wanted him to do. R.p. 903. By seeking to know the whereabouts and doings of Fuller so constantly, White was almost certainly endeavoring to exercise a considerable degree of control over him. As a successful entrepreneur, White appeared to keep close tabs on everyone in his organization.

In sum, Mr. Ferguson's testimony on this point was somewhat equivocal but viewed together with the overall picture of the relationship as described by Mrs. Fuller and Ms. McMullen, the whole must support a finding of employee status.

2. Whether the work undertaken can be discontinued or terminated at any time by either party and without a corresponding liability for its breach. The right to terminate a worker's services at will is indicative of economic control on the principal's part and is antagonistic to the independent nature of the contractor's business. *Hickman v. Southern Pac. Transp. Co.*, supra, 262 So.2d at 391. The principal's arbitrary decision to dishonor an existing contract would expose him to liability for breach of contract. See A. Larson, *Workmen's Compensation*, desk ed. § 44.35 (1985). An employer's arbitrary decision to fire an employee would be without major consequence, except perhaps for unemployment compensation. LSA-R.S.23:1601

The testimony on this factor was fairly clear. Ms. McMullen testified that White could have released Fuller at any time and that Fuller could have left. R.p. 912. Mr. Ferguson testified likewise, noting that Fuller, unlike himself, did not have a written contract declaring that he would be self-employed. R.p. 1910. Mrs. Fuller testified that her husband could not have just "upped and left," because this would violate both his moral obligation to White and her impression of their verbal agree-

ment. However, she stated otherwise in a deposition prior to trial. R.p.p. 1580, 1581. She never offered any other details of this alleged agreement, and she made no statement as to White's right to terminate Fuller. On the whole, this evidence leads us to conclude that White and Fuller's arrangement was terminable at will. Mrs. Fuller's single remark as to her husband's obligation to White is easily outweighed by the other testimony and supports a finding of employment status.

3. Whether the worker renders service for a specified price to be paid for a specified result either as a unit or a whole. R.S. 23:1021(6). To support independent contractor status, the contract must call for a specific piecework as a unit to be done according to the contractor's own methods, at a specified price and for a specified time. *Amyx v. Henry & Hall,* supra, 79 So.2d at 486. Payment on a time basis is a strong indication of the status of employment, whereas payment on a completed project basis is indicative of independent contractor status. Larson, *op. cit.* § 44.33. There was no documentation of any agreement for a specific undertaking as a unit or a whole, or for any specific amount of work to be performed together, and no invoices claiming payment for a specified period of time. According to Mr. Ferguson, Fuller never did a specific parcel of work, but rather performed both office duties and field duties, depending on "what we had going on at the time." R.p. 1903, 1895. There was nothing to rebut the documentary evidence and direct testimony that Fuller was being paid on a regular time basis to perform whatever tasks White directed in the furtherance of the business. This factor supports a finding of employee status.

4. The manner in which the worker is carried on the payroll of the principal. If the worker is carried on the principal's payroll as an employee, then an employment relationship is indicated. White paid Fuller from his personal account, or from

the Blanco Special Account, under entries labeled "Engineering Services" or "Professional Fees." White did not withhold federal or state income tax and did not pay FICA or unemployment tax for Fuller. Standing alone, this would not disprove employee status. See *Suhor v. Medina*, 421 So.2d 271 (La. App. 4th Cir. 1982). However, Fuller's own records corresponded with White's payment scheme. He submitted quarterly returns based on estimated tax and paid self-employment tax, listing petroleum engineering as his business. If Fuller had considered himself an employee, he probably would have requested White to give him the benefit of the lower FICA rate and the freedom from quarterly payments. Fuller would not have assumed the added expense and inconvenience unless he thought it reflected their business relationship. Admittedly, the payroll arrangement could be explained by saying that White did not need the business deductions. R.p. 1899. In *Sones*, supra, the plaintiff's decedent was paid similarly to Fuller and was nevertheless determined to be an employee. However, on the whole, this factor weighs in favor of independent contractor status.

5. The right of the worker, whether exercised or not, to hire helpers and assistants. No evidence was produced as to the right to hire, although Fuller unquestionably did not hire any and appeared to use Blanco's and White's staff. Since he did not contract for a specific job at a specific price, we question whether he could have hired anyone on the pay he was receiving.

6. The source of the materials and equipment to be used by the worker. When the principal provides valuable equipment, the relationship is usually one of employment. *Hickman v. Southern Pac. Transp. Co.*, supra, 262 So.2d at 390; Larson, *op. cit.*, § 44.34. The evidence showed that White provided Fuller with a car and auto insurance, just like the plain-

tiff in *Hickman*, who was determined to be an employee. Moreover, White provided office space in American Bank Tower without charge, as well as secretarial and clerical assistance. R.p.p. 901, 902. Most of Fuller's business expenses were either advanced or reimbursed by White. This evidence overwhelmingly shows that Fuller was merely using White's means of production, as an employee typically does.

The appellees introduced Fuller's 1980 Schedule C income tax return, showing a small deduction for office supplies. Fuller's accountant, Mr. Thomas, explained that many of the deductions usually taken by businessmen were simply not applicable to Fuller because he had been in business only a short time and did not yet have a staff or major expenses. R.p. 853. However, the majority of Fuller's expenses were reimbursed by White or Blanco in the fashion of ordinary employment. R.p. 1901. We are also constrained to note that the 1980 Schedule C was filed *after* the tragic accident, when litigation may have been anticipated. The overall weight of the evidence shows convincingly that White supplied the material, equipment, supplies and clerical help used by Fuller. This factor supports a finding of employee status.

7. Whether the worker performing the services is an integral part of the principal's business or whether he is independent of the principal's business. Independent contractor status presupposes the independent nature of the worker's business and is not exclusive as to the means whereby it is accomplished. *Amyx v. Henry & Hall,* supra, 79 So. 2d at 486. Ms. McMullen, testifying for appellee, conceded that Fuller's services were "vital" to the business, R.p. 903, and Mr. Ferguson, testifying for USAIG, called them "essential." R.p. 1894. In fact Mr. Ferguson specifically referred to Fuller's services as a "part of the business." In light of this testimony,

it would be specious to say that White could not have directed Fuller in regard to the particulars of the operation. *Amyx v. Henry & Hall,* supra, 79 So.2d at 487. We must reject appellee's contention in brief that Fuller's work was "independent of and separate from" Blanco's business.

Appellee has stressed Fuller's specialized, technical training as indicative of his independence from White's enterprise. We agree that a professional person is more likely than a laborer or a clerical worker to serve as an independent contractor. However, a professional person's status is not automatically ascertained. See *Ducote v. Albert,* 503 So.2d 85 (La. App. 5th Cir. 1987). aff'd 521 So.2d 399 (La. 1988), holding that summary judgment is not a proper vehicle for determining a company doctor's status. In affirming *Ducote,* the supreme court plainly stated that a company doctor or plant physician is not an independent contractor for all purposes as regards the workers comp law. 521 So.2d at 400. Rather, the circumstances of the case are determinative. See also *Suhor v. Medina,* supra. The evidence plainly shows that Fuller's services as a petroleum engineer were both essential to and a part of White's petroleum business, and thus subject to the latter's control.

Appellee further argues that White engaged a number of professional people, such as the C.P.A., Mr. Thomas, for technical services essential to the business. Mr. Thomas, however, maintained an independent business entity, separate offices and his own staff. Fuller did not. The fact that White hired other people who would appear to be independent contractors does not alter the predominant evidence that Fuller was an employee. The evidence bearing on this factor supports a finding of employee status.

8. Whether a person performs work for a principal on a continuing and exclusive basis. In *Sones,* supra, this court attached

"particular significance" to the fact that the plaintiff's decedent rendered services to the defendant on a continuing and exclusive basis; this evidence was strong enough to overcome many indicia of contractor status because it suggested the worker's dependence on the principal. Simply put, a person who performs services for one principal across an extended period of time is more likely to be an employee. The evidence is not disputed that Fuller worked exclusively and continuously for White from the beginning of 1980 until his death. Mrs. Fuller testified that White's projects kept her husband quite busy and that he had not yet found the time to set up an office or business with other clients, though he intended to do so. However, the 16-month history between White and Fuller provides nothing else on which to base this conclusion. Appellees argue the alleged "new business venture" involving the Midland field is evidence of Fuller's independence and his incipient contracting business.[2] We do not agree. It appears that when Fuller received information about the leases in Midland, he immediately involved White. This indicates he needed White's support and viewed him as an employer. White allowed Fuller to purchase a considerably larger interest in a Midland well than in any of the Haynesville projects, but this is probably a reflection of the help that Fuller's father rendered in securing the leases, and is not different from Fuller's proprietary holdings in previous wells. This factor clearly supports a finding of employee status.

Several other points were developed at trial. The first of these is one we feel the court should have incorporated into

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[2]Appellee cites as further evidence of Fuller's "new" status the "fact" that in early 1981, he began receiving paychecks monthly instead of semimonthly. Br., 31. This assertion is not supported by the evidence. Exhibit P-5 shows continued semimonthly checks throughout 1981.

the jury charge. It involved "perks" not directly connected with production, such as insurance coverage. Mr. Herrington, an insurance agent, testified that he included Fuller's salary in calculating the original premium estimate on Blanco's workers comp policy. Fuller's name did not appear on the final audit, which was prepared after the tragic accident. Carrying someone on a workers comp insurance policy is not an admission of employee status. *Allgood v. Loeb*, 210 La. 594, 27 So.2d 380 (1946).

The life and hospitalization insurance received by Fuller free of charge are much more persuasive of employment status. It seems elementary that the purpose of hiring contractors is to escape the costs of employee expenses; in fact, the compensation law usually tries to circumvent loopholes that would allow employers to evade their comp obligations. See LSA-R.S. 23:1061. By providing such lavish fringe benefits, White showed a willingness to assume employee costs that can only be equated with the perception that he was in an employment relation. We feel this is a valid consideration in the overall economic relationship between Fuller and White, and it strongly supports a finding of employee status.

Finally, there were two documents, a financial statement and a pilot record, on which Fuller listed himself as Blanco's employee. Standing alone, neither of these would be especially probative, but they were prepared under circumstances where Fuller would have had no motive to misstate his true status, and they correspond with the overwhelming weight of the evidence to show that Fuller perceived himself an employee of Blanco Oil.

In sum, all but one of the factors clearly support a finding of employee status. The evidence indicates a relationship of almost total economic dependence. As this court pointed out in *Sones*, such a finding equates with a substantial right of con-

trol on White's part. This degree of control is incompatible with the independence that is the hallmark of an independent contractor. Even though there was no direct evidence that White directed Fuller as to detail every day, the testimony bearing on the factors is so strong that it mandates a finding of employment status. The evidence is considerably stronger than in *Sones*. Given the overwhelming nature of the evidence, even under the standard of manifest error, we would be constrained to hold the verdict plainly wrong. And given the inadequacy of the jury instructions, we conclude *a fortiori* that the evidence preponderated to show that Doug Fuller was an employee of Joe Bob White.

We have also considered the evidence of the fast friendship and nearly filial relation between Fuller and White, questioning whether White's generosity might be more reflective of friendship and a desire to lend a helping hand than of desire to establish an employment relationship. Under the circumstances of the case, White's paternalistic leanings could probably explain one or two aberrant findings, such as providing office space and supplies for someone who was really an independent contractor. However, we are unable to stretch this speculative theory to counteract the wide array of facts that militate so inevitably in favor of employment. To do so would require us to disregard the plain impact of the overwhelming weight of evidence.

The evidence also shows, with remarkable clarity, that at the time of the accident, Fuller was an employee functioning in the course and scope of his employment with White, and the accident arose out of the course and scope of employment. LSA-R.S. 23:1031. The tragic plane flight was undertaken in pursuit of White's new project at the Midland field; from all appearances Fuller was to work for him there in a manner similar to his work at Haynesville field. Fuller was exposed

to the risk of the flight because of his employment for White. See *Kern v. Southport Mill*, 174 La. 432, 141 So. 19 (La. 1932). The time and place of the flight were obviously contemplated by White. *Whitney v. United States Fid. & Guar. Co.*, 373 So.2d 728 (La. App. 2d Cir. 1979), writ denied 376 So.2d 320 (La. 1979). Appellee's claims are subject to the exclusive remedies of the Workers Compensation statute, for which USAIG is not liable under its policy.

Because of our conclusion as to liability, we need not discuss the issue of quantum raised by appellee in her answer to appeal.

CONCLUSION

For the reasons expressed, the judgment of the trial court is reversed. Douglas Fuller was an employee of Joe Bob White and the accident arose out of, and during the course and scope of his employment for White. Appellee's remedy lies exclusively in workers compensation. Judgment is hereby rendered dismissing plaintiff's claims at her costs.

REVERSED AND RENDERED.

TREATIES WITH THE FRENCH REPUBLIC

Cession of Louisiana - Treaty of 1803

Article III

The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States; and, in the mean time, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

ORGANIC ACTS OF CONGRESS RESPECTING ADMISSION OF STATE OF LOUSIAINA

Territories of Louisiana and Orleans, Act of Congress March 26, 1804, c. 38, 2 U.S. Stat. 283

Sec. 4. . . . Their legislative powers shall also extend to all the rightful subjects of legislation; but no law shall be valid which is inconsistent with the constitution and laws of the United States . . . .

Sec. 5. . . . In all cases, criminal and civil, in the superior court, the trial shall be by a jury, if either of the parties require it . . . .

Territorial Government of New Orleans - 1805, Act of Congress March 3, 1805

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he is hereby, authorized to establish within the territory of Orleans a government in all respects similar (except as is herein otherwise provided) to that now exercised in the Mississippi territory . . . and that from and after the establishment of the said government, the inhabitants of the territory of Orleans shall be entitled to and enjoy all the rights, privileges, and advantages secured by the said ordinance, and now enjoyed by the people of the Mississippi territory.

. . . . . .

Sec. 7. And be it further enacted, That whenever it shall be ascertained by an actual census or enumeration of the inhabitants of the territory of Orleans, taken by proper authority, that the number of free inhabitants included therein shall

amount to sixty thousand, they shall thereupon be authorized to form for themselves a constitution and state government . . . Provided, That the constitution so to be established shall be republican, and not inconsistent with the constitution of the United States, nor inconsistent with the ordinance of the late Congress, passed the thirteenth day of July, one thousand seven hundred and eighty-seven, so far as the same is made applicable to the territorial government hereby authorized to be established . . . .

Enabling Act,
Act of Congress Feb. 20, 1811

Sec. 3. And be it further enacted, That the members of the convention, when duly elected, be, and they are hereby, authorized to meet at the city of New Orleans, on the first Monday of November next, which convention, when met, shall first determine, by a majority of the whole number elected, whether it be expedient or not, at that time, to form a constitution and state government for the people within the said territory . . . whereupon the said convention shall be, and hereby is, authorized to form a constitution and state government for the people of the said territory; Provided, The constitution to be formed, in virtue of the authority herein given, shall be republican, and consistent with the constitution of the United States . . . .

Admission of the State of Louisiana
Act of Congress April 8, 1812

Whereas the representatives of the people of all that part of the territory or country ceded, under the name of "Louisiana," by the treaty made at Paris on the thirtieth day of April, one thousand eight hundred and three, between the United States and France . . . did, on the twenty-second day of January, one thousand eight hundred and twelve, form for

themselves a constitution and state government, and give to the said state the name of the state of Louisiana in pursuance of an act of Congress entitled "An act to enable the people of the territory of Orleans to form a constitution and state government, and for the admission of the said state into the Union on an equal footing with the original states, and for other purposes;" and the said constitution having been transmitted to Congress, and by them being hereby approved: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the said state shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever, by the name and title of the state of Louisiana; Provided That . . . the conditions and terms contained in the third section of the act, the title whereof is hereinbefore recited, shall be considered, deemed, and taken fundamental conditions and terms, upon which the said state is incorporated in the Union.

. . . . . .

Sec. 3. And be it further enacted . . . there shall be established in the said district a district court, to consist of one judge, who shall reside therein, and be called the district judge . . . . The said judge shall, in all things, have and exercise the same jurisdiction and powers which, by the act the title whereof is in this section recited, were given to the district judge of the territory of Orleans . . . .

CONSTITUTIONS OF THE STATE OF LOUISIANA

Constitution of 1812

Article IV

CONCERNING THE JUDICIARY DEPARTMENT

§ 2. The supreme court shall have appellate jurisdiction only, which jurisdiction shall extend to all civil cases when the matter in dispute shall exceed the sum of three hundred dollars.

Constitution of 1898

COURTS OF APPEAL

Art. 98. [As amended Acts 1906, No. 137, adopted Nov. 6, 1906]. The Courts of Appeal, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases, civil and probate, when the matter in dispute or the fund to be distributed shall exceed one hundred dollars, exclusive of interest, and shall not exceed two thousand dollars, exclusive of interest, and such appeal shall be upon the law and the facts.

Constitution of 1974

Article V

§ 10. Courts of Appeal; Jurisdiction

Section 10. (B) Scope of Review. Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts. In criminal cases its appellate jurisdiction extends only to questions of law.

CONSTITUTION OF THE UNITED STATES

Amendment [VII.]

Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

LOUISIANA CODE OF CIVIL PROCEDURE

CHAPTER 7. JURY TRIAL

Art. 1731. Issues triable by jury

A. Except as limited by Article 1732, the right of trial by jury is recognized.

. . . . . .

Art. 1732. Limitation upon jury trials

A trial by jury shall not be available in:

(1) A suit where the amount in dispute does not exceed twenty thousand dollars exclusive of interest and costs.

(2) A suit on an unconditional obligation to pay a specific sum of money, unless the defense thereto is forgery, fraud, error, want or failure of consideration.

(3) A summary, executory, probate, partition, mandamus, habeas corpus, quo warranto, injunction, concursus, worker's compensation, emancipation, tutorship, interdiction, curatorship, legitimacy, filiation, separation from bed and board, annulment of marriage, or divorce proceeding.

(4) A proceeding to determine custody, visitation, alimony, or child support.

(5) A proceeding to review an action by an administrative or municipal body.

(6) All cases where a jury trial is specifically denied by law.

Amended by Acts 1983, No. 534, § 1; Acts 1984, No. 301, § 1; Acts 1987, No. 766, § 1.

Art. 1733. Demand for jury trial; bond for costs

A. A party may obtain a trial by jury by filing a pleading demanding a trial by jury and a bond in the amount and withi the time set by the court pursuant to Article 1734.

. . . . . .